

CONCERNING

an application for review pursuant to s 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [North Island] Standards Committee

BETWEEN

MS RB

Applicant

AND

MS CG

Respondent

The names and identifying details of the parties have been changed in this decision

DECISION

Background

[1] Ms CG was instructed as counsel for Ms RB in 2007. Ms RB had separated from her husband, and instructed Ms CG to apply for a Protection Order on an urgent basis. Ms RB also instructed Ms CG to apply to the Family Court for orders governing the day-to-day care of her [child], and to resolve the division of relationship property between her and her former husband.

[2] A temporary protection order was granted in [mid] 2007, and made final in [late] 2007.

[3] Ms CG acted for Ms RB on the relationship property matter until it was resolved by consent in 2010, but care and guardianship disputes continue.

[4] In order to make arrangements with respect to their [child]'s care after they had separated and before they finalised the proceeding over [the] day to day care arrangements by consent, Ms RB and her former husband corresponded by email. In some cases, her former husband's emails included comments that he later accepted

were a breach of the protection order¹ (the emails). Although Ms RB received some of the emails while Ms CG was acting for her, she received others after Ms CG had completed her work.

[5] Ms RB's complaint is that Ms CG did not advise her that she could use the protection orders to make the abusive emails stop. She says she did not understand that the content of the emails was evidence of psychological abuse, and that she could report that abuse to the police. Ms RB says that when she sought advice from another lawyer, that lawyer told her to take the emails to the police. Ms RB gave the emails and a statement to police. The police successfully prosecuted her former husband for breaching the protection order, he was convicted in [2011], and the emails stopped.

[6] On the basis that Ms CG's advice to her on the protection order was deficient, Ms RB refused to pay Ms CG's outstanding fee of \$7,742.37, and on 14 December 2011, she complained to the New Zealand Law Society (NZLS).

Standards Committee decision

[7] After receiving notice of the complaint against her, Ms CG requested information from the police, believing she was still acting for Ms RB. Ms RB says after she received advice from the other lawyer about the protection orders, she lost confidence in Ms CG and would never have gone back to her for advice, although she had not told Ms CG that.

[8] As a consequence of Ms CG's request of police, Ms RB registered her objection with NZLS saying Ms CG had breached her right to privacy. NZLS put that matter to Ms CG, obtained her response and dealt with it in the decision.

[9] The Standards Committee considered the conduct, fees and privacy aspects of the complaint, the information the parties had provided, and decided pursuant to s 138(2) of the Lawyers and Conveyancers Act (the Act) that further action on Ms RB's complaint was unnecessary or inappropriate.

[10] The Committee considered that Ms CG had acted appropriately and provided competent advice to Ms RB, and that she was aware that she was able to report abusive emails to the police as evidence of a breach of the protection order. The Committee considered that Ms CG's fees were fair and reasonable, and that she had not breached Ms RB's privacy by writing to the police for information about breaches of the protection order after the complaint was laid against her. Their reasoning was that

¹ RB's complaint to NZLS dated 14 December 2011.

Ms RB had not told Ms CG she was no longer instructed so was entitled to consider that Ms RB remained her client, and that Ms RB had thereby consented to Ms CG corresponding with the police.

[11] Ms RB was not satisfied with the Standards Committee's decision, and applied for a review.

Review application

[12] Ms RB says that the Standards Committee had insufficient evidence to support its findings that Ms CG had acted appropriately, or that she had provided competent advice to Ms RB to enable her to understand that she was able to report the emails to the police as evidence of a breach of the protection order. She says that Ms CG is not entitled to be paid because if she had been properly advised, she would have been able to stop the emails sooner, thereby reducing her legal costs and avoiding the costs of counselling to overcome the emotional toll the emails took on her.

[13] She also maintains her protest that her privacy was breached by Ms CG writing to the police after she had laid her complaint to request information that was personal to her.

[14] In summary, Ms RB says that Ms CG has breached the trust she placed in her. She wants her to accept ownership of her failings, reduce her fees by \$5,000, pay \$800 for Ms RB's counselling, and ensure that Ms CG understands she must be more careful in advising her clients in future.²

Role of the LCRO

[15] The role of the Legal Complaint's Review Officer (LCRO) on review is to reach her own view of the lawyer's conduct based on the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgment for that of the Standards Committee, without good reason.

Scope of review

[16] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken

² Stated verbally at the review hearing on 10 June 2014.

on any particular review and the extent of the investigations necessary to conduct that review.

Review hearing

[17] Ms RB attended a review hearing on 10 June 2014 in [city]. Ms CG was not required to attend, and the review hearing proceeded in her absence.

Review issue

[18] At the review hearing Ms RB traversed her privacy concerns about Ms CG's conduct after she had laid her complaint to NZLS. Although it does not fall within the original complaint, Ms CG has had the opportunity to respond, and says she requested information from the police after the complaint had been made to enable her to defend Ms RB's allegations.

[19] Although Ms RB says her confidence in Ms CG was so undermined she would never have instructed her again, aside from her complaint to NZLS, there is no evidence that she had signalled the end of their professional relationship to Ms CG.

[20] The Committee did not consider Ms CG's conduct had fallen below an acceptable standard in circumstances where she had no reason to believe her instructions from Ms RB were at an end, and she was defending herself against Ms RB's complaint.

[21] Ms RB says that it should have been obvious from the fact that she had laid a complaint that she would never instruct Ms CG again, but that is not necessarily the case. A client is free to instruct the lawyer of their choice, whether or not a complaint has been made.

[22] However, Ms RB's sensitivity around her privacy is understandable, and it would have been prudent for Ms CG, having received the complaint, to have sought consent before making the request of police, or to have copied her request of the police to Ms RB.

[23] I do not consider that Ms CG's conduct falls below the standards in the Act, so the question of privacy will not be addressed further in this decision.

[24] The review issue is whether the Committee's decision to take no further action on Ms RB's complaints is reasonable, or whether Ms CG's conduct falls within any of the definitions of unsatisfactory conduct in the Act.

Facts

[25] The focus of this part of the review is on the advice Ms CG provided to Ms RB with respect to the protection order application before and at the time the orders were made. The protection order was made final [in 2007], although Ms CG continued to act for Ms RB in respect of child care and relationship property for another three years.

[26] There is no dispute that Ms CG provided advice and sent a copy of the protection order to Ms RB shortly after it was granted, and Ms RB confirms that she read the order.³ However, Ms RB's expectation was that when she provided Ms CG with copies of the emails, she should have realised they were a form of psychological abuse, and told her to report the emails to the police as being in breach of the protection order.

[27] While that may not have been an unreasonable expectation, it is not the same as saying that, in all the circumstances, Ms CG's failure to meet that expectation fell below any of the standards provided in the Act.⁴

[28] There is room for a difference of opinion over whether the emails fall within the parameters of psychological abuse contemplated in the legislation under which protection orders are made.⁵ Ms CG says her view was that they probably did not, and that view was supported by the Family Court Judge who heard the care proceeding.⁶ However, Ms RB, another lawyer, the police and ultimately the Judge in a criminal court took a different view. That does not mean that Ms CG's view was unreasonable or wrong; it was just different.

[29] The question is not whether Ms CG's opinion was right or wrong, but whether the advice she gave in respect of the protection order fell below the minimum standard the Act requires. By deciding that further action on Ms RB's complaint was unnecessary or inappropriate, the Standards Committee considered it did not fall below the standard required, and that Ms CG's conduct was not unsatisfactory.

Unsatisfactory conduct

[30] The Act provides different standards against which conduct is to be measured. Ms CG's conduct does not fall within the category of conduct that breaches the Act or Rules made under it,⁷ but conduct can be unsatisfactory according to the standards

³ Above n 2.

⁴ Lawyers and Conveyancers Act 2006, s 12.

⁵ Domestic Violence Act 1995.

⁶ *JLLC v LJLC* FC North Shore FAM 2007 044 0015 Reserved decision of [Judge] [date] at para [10].

⁷ Above n 4 at s 12(c).

expected by a member of the public or by lawyers of good standing.⁸

[31] Standards of professional conduct are evaluated by Standards Committees comprised of non-lawyers and lawyers, and this Office, against the definitions in s 12 of the Act, which define as unsatisfactory conduct:

- (a) conduct of the lawyer ...that occurs at a time when ... she ... is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer ... that occurs at a time when ... she ... is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including –
 - (i) conduct unbecoming a lawyer ...; or
 - (ii) unprofessional conduct.

[32] For the purposes of review, it is relevant, but not necessarily conclusive, that the professional and lay members of the Standards Committee did not consider that Ms CG's conduct fell below the standards set out in s 12. That is a finding the members of the Committee have the discretion to make, so it is appropriate to exercise particular caution before substituting my own judgment for the Committee's, without good reason.

[33] I have carefully considered the material that was before the Committee, and been unable to find any reason to depart from the Committee's view.

[34] I have also considered the material that the parties have provided on review, including Ms RB's review application and the additional material that contained, the evidence Ms RB gave at the review hearing and further evidence provided by Ms CG after the review hearing.

Discussion

[35] It is significant that Ms RB says Ms CG advised her on the protection order, gave her a copy shortly after it was made, and that she read it. Ms CG confirms she spent a significant amount of time with Ms RB, before making the protection order application, and after orders were made, discussing the terms of the order and how it would work. Ms CG also says she and Ms RB reviewed and discussed the standard conditions when they first met, several days before Ms RB instructed Ms CG to apply for the order.

⁸ Above n 4 at s 12(a) and (b).

[36] The standard conditions set out in the protection order repeat the relevant legislation,⁹ saying that her former husband “must not:...(iv) engage, or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of any protected person”.¹⁰

[37] Ms RB says that the nub of the advice she received from Ms CG after she had encountered her former husband at [an event] while the protection order was in place was that she could either tolerate behaviour that was a potential breach, or report it to the police; the choice was hers to make.¹¹

[38] Ms RB’s evidence is that she was aware the protection order enabled her to complain to police about her husband’s actions, but her reason for not taking action was that she had not realised the emails were a possible basis for a complaint to police. She says that if Ms CG had properly explained the way the order worked, she would have understood the emails constituted psychological abuse, would have reported them to police two or three years earlier; that in turn would have reduced her legal and counselling costs, and enabled her to avoid the emotional trauma of psychological abuse.

[39] I do not accept that Ms RB acted, or failed to act, in the way that she did because Ms CG’s explanation was inadequate at the time the protection orders were made.

[40] Ms RB’s evidence at the review hearing was that shortly after she obtained the protection order, she had reported what she considered to be a breach to police. That report did not result in satisfactory outcomes for her, because it did not change her former husband’s behaviour towards her or their [child]. Her former husband continued to send the emails, which she later put into evidence in the care proceeding.

[41] The family court Judge considered the emails in the context of cross-applications over contact, where the central consideration was the best interests of Ms RB’s [child], and whether [it] was safe in her father’s unsupervised care.¹²

[42] Unfortunately, from Ms RB’s perspective, the Judge did not view the emails in the same light as Ms RB did, saying that although the emails were “unwelcome”, she did not consider the email exchange constituted “emotional abuse”.¹³

⁹ Domestic Violence Act 1995, s 4.

¹⁰ Protection Order dated 17 October 2001 at [1(a)].

¹¹ Above n 2.

¹² Above n 6 at [4].

¹³ Above n 6 at [10].

[43] Ms RB says that her confidence in the protection order was undermined, because she thought it was there to protect her and her [child] from the threat she perceived from her former husband. She says that when she tried to invoke that protection she did not get the result she wanted, because the abuse continued. That was why she wanted the order, and she could not see how it could be of any use when her calls on it had been denied.

[44] Ms RB's reasons help to inform her reactions at the time, but they also undermine what she says is a direct correlation between what she did or did not do, and the quality and content of the advice she received from Ms CG at the time the protection order was made.

[45] Having discussed with Ms RB her understanding of the effect of the protection order around the time it was made, I am satisfied that she was aware of the standard condition relating to psychological abuse, and that she could approach the police if she was concerned that her former husband had done something which might breach the order. I consider that her understanding at the time the orders were made was based on the advice Ms CG provided, and it is most likely that subsequent events derailed her confidence in, and inclination to use, the protection order.

[46] Ms RB may not have been aware that she could specifically report abusive emails to the police, but she was aware in a more general sense that she could report her husband's behaviour if it was of concern to her. Ms CG was not obliged to detail every type of behaviour that could breach the protection order when she gave her advice.

[47] I consider that the Committee was correct to find that Ms CG had provided competent advice to Ms RB at the time the orders were made. It follows that I have found no good reason to interfere with that aspect of the Committee's decision, and it is confirmed.

Fees

[48] The second aspect of Ms RB's complaint was that, taking into account her failure to properly advise on the protection order, Ms CG's fees totalling \$18,086.62 for work she did between [2010] and [2011] were too high. For the reasons discussed above, there was no failure to properly advise, so that cannot be a reason to reduce Ms CG's fees.

[49] Ms RB does not say that Ms CG's fees are unfair or unreasonable for any other reason. Her attendances related to two mediations and preparation for a defended

hearing which was settled shortly before the hearing by consent. Ms RB made some payments, but says she stopped after police arrested her husband for breaching the protection order, saying she could have secured that outcome earlier if Ms CG had given her the advice she finally got from another lawyer.

[50] Ms CG says her fees represent less time than she spent on Ms RB's file, and that she extended offers of payment over time, without a reduction in the fee, but that \$7,742 remains outstanding.

[51] Although the Standards Committee did not formally inquire into Ms CG's fees, it found they were fair and reasonable. Standards Committees are constituted of experience practitioners and lay members, who are well placed to make that determination. There would have to be good reason for me to disturb the Committee's view on review, and I have found none.

[52] Immediately after separation, the parenting arrangements for Ms RB's [child] were highly contentious. The question of whether Ms RB's [child] would be safe to have contact with her father without supervision required a three day hearing in 2009, which involved 12 witnesses. The court's file was contained in a box, the size of which the Family Court Judge observed "exemplifies a level of dispute between the parties",¹⁴ and that was not the end of the disputes over parenting and guardianship issues. Ms RB's evidence at the review hearing is that she and her former husband continue to be at odds over aspects of their [child]'s care and guardianship decisions, which supports the view that this was a difficult file in which the parties firmly held opposite views.

[53] The evidence shows that Ms CG carried out a considerable amount of work for Ms RB, and does not show that there is any reason to reduce the fees she charged for undertaking that work. I have been unable to identify any evidence that suggests the Committee's decision to take no further action with respect to Ms CG's fees is unreasonable or incorrect. It follows that there is no reason to interfere with that aspect of the decision.

Outcome

[54] The Committee's decision is confirmed in all respects.

Costs

[55] The Legal Complaints Review Officer has the broad discretion to make such costs orders as she thinks fit pursuant to s 210(1) of the Act.

[56] There is no reason to make a costs order against Ms RB. While her application for review has not resulted in an adverse finding against Ms CG, Ms RB should not take that as any kind of criticism of her. The evidence supports the view that she made her review application in good faith.

[57] There is also no reason to make a costs order against Ms CG. There is no evidence that her advice to Ms RB was wanting, or that her fee was unfair or unreasonable. She has done nothing to add to the costs of this review.

[58] No costs orders are made on review.

Decision

Pursuant to s 211 of the Act, the decision of the Standards Committee is confirmed.

DATED this 30th day of June 2014

Dorothy Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms RB as the Applicant
Ms CG as the Respondent
The [North Island] Standards Committee
The New Zealand Law Society
Secretary for Justice

¹⁴ Above n 6 at [1].